



## DEPARTMENT OF JUSTICE

Antitrust Division

**CHARLES A. JAMES**

Assistant Attorney General

---

Main Justice Building  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001  
(202) 514-2401 / (202) 616-2645 (f)  
[antitrust@justice.usdoj.gov](mailto:antitrust@justice.usdoj.gov) (internet)  
<http://www.usdoj.gov> (World Wide Web)

October 25, 2001

Alan P. Sherbrooke, Esq.  
Garvey, Schubert & Barer  
Second & Seneca Building  
1191 Second Avenue  
Seattle, Washington 98101-2939

Dear Mr. Sherbrooke:

This letter responds to your request for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6. You have requested a statement of the Antitrust Division's current enforcement intentions with respect to a proposed exchange of cost information among your client, Foss Maritime Company ("Foss") and nine other firms that provide towing and barge services in various U.S. waters.

Foss, Crescent Towing Company, Inc., ("Crescent"), Crowley Marine Services ("Crowley"), Hawaiian Tug and Barge ("HTB"), Intercoastal Towing Corp. ("Intercoastal"), Maritrans Operating Partners LP ("Maritrans"), McAllister Towing & Transportation ("McAllister"), Moran Towing Corporation ("Moran"), Penn Maritime ("Penn"), and Sause Bros. Ocean Towing ("Sause") provide tug and barge services in the United States.

Although all of the firms do not compete against each other in all of the markets they serve, there is substantial competition between several of the firms in different

markets.<sup>1</sup> Thus, six of the ten firms serve all or part of the Gulf of Mexico. Five are active in some parts of the East Coast, and three serve ports on the West Coast.

In an effort to reduce their costs, the firms propose to submit certain historical cost information to an independent third party who will compile the data and distribute statistical analyses of the data to the Companies (the “Survey”). The stated purpose of the Survey is to establish benchmarks and best practices so that each Company will be better able to identify those areas in which it has the greatest potential to reduce costs, improve efficiency, and improve the quality and value of the service it offers to customers. The Companies intend to design and implement the Survey in accordance with the principles set forth in Statement 6 of the Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care, “Antitrust Safety Zone: Exchanges of Price and Cost Information Among Providers That Will Not Be Challenged, Absent Extraordinary Circumstances, By The Agencies.”

The data to be surveyed generally will fall within seven categories: 1) the Survey will calculate “utilization”, i.e. the time a tug or barge is working compared to the time it is idle or under repair; 2) the cost of repairs will be compared to gross revenues on a company-wide and per-tug basis; 3) the cost of damage claims and insurance premiums will be compared to gross company revenues; 4) the Survey will compare company revenues per engine-hour and sea-going employee; 5) sea-going labor costs will be compared to gross revenues, and stated on an engine-hour basis; 6) the survey will also calculate ratios of overhead expenses to revenue and overhead per-employee; 7) a supply-costs to revenue ratio will be ascertained and supply-costs per tug and per engine-hour benchmarks will be developed.

In accordance with Statement 6 of the DOJ/FTC Health Care Guidelines, the Survey will be managed by an independent entity -- PricewaterhouseCoopers or another national accounting firm. All data submitted by the Companies to the Survey manager will be more than three months old at the time the results of the Survey are disseminated. The Survey manager will be instructed not to disseminate data on any particular statistical point unless (a) at least five Companies submit data on that point and (b) no individual Company’s data represents 25 percent or more, on a weighted basis, of that statistical

---

<sup>1</sup> Crescent operates in the Gulf of Mexico and on the East Coast. Crowley operates in the Gulf of Mexico and on the East and West Coasts. Foss operates in the Gulf of Mexico and on the West Coast. HTB (which is a sister corporation to Foss) operates in Hawaii. Intercoastal operates in Houston, Texas. Maritrans operates in the Gulf of Mexico. McAllister operates on the East Coast. Moran operates in the Gulf of Mexico and on the East Coast. Penn operates primarily in the Northeast. Sause operates on the West Coast.

point. For example, data will not be segregated into East Coast or West Coast geographic areas as long as fewer than five Companies operate in those areas. In addition, the Survey manager will be instructed not to disseminate data on any particular statistical point unless the data is sufficiently aggregated that recipients would not be able to identify the data supplied by any individual Company. No pricing information will be included in the survey. Nor will it include any information about plans for new equipment, redeployment of existing equipment, or marketing plans. No data of any kind will be exchanged directly between or among the individual companies.

Based on the information and assurances that you have provided to us, the Department has no current intention to challenge the information exchange that you have described. To the extent that information is exchanged in accordance with the statements and commitments in the materials submitted to the Department, the information exchange should not have any anticompetitive effects. The use of any “best practice” developed will be voluntary. Moreover, the limited nature of the proposed cooperation--historic cost information on an aggregated basis with no discussion of pricing or other sales related conduct--should limit any risk that the data exchanged could lead to concerted pricing.

It is possible that the proposed information sharing will have procompetitive effects. To the extent that it reduces towing or barge costs, the proposal may lead to lower prices and expanded output to the benefit of consumers.

This letter expresses the Department’s current enforcement intention. In accordance with our normal practices, the Department reserves the right to bring any enforcement action in the future if the actual operation of any aspect of the proposed information exchange proves to be anticompetitive in any purpose or effect.

This statement is made in accordance with the Department’s Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made

publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

/s/

Charles A. James  
Assistant Attorney General